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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

10 IN RE: SOCIAL MEDIA ADOLESCENT
11 ADDICTION/PERSONAL INJURY PRODUCTS
12 LIABILITY LITIGATION

This Document Relates To:

ALL ACTIONS

MDL No. 3047

Case No. 4:22-md-03047-YGR (PHK)

**AGENDA AND JOINT STATEMENT
FOR SEPTEMBER 13, 2024, CASE
MANAGEMENT CONFERENCE**

Judge: Hon. Yvonne Gonzalez Rogers

Magistrate Judge: Hon. Peter H. Kang

1 Pursuant to Case Management Order (“CMO”) No. 1 (ECF 75), the Parties submit this agenda
 2 and joint statement in advance of the September 13, 2024 Case Management Conference (“CMC”).
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I. Update on Pending Motions

4 The Court has taken under submission Defendants’ motions to dismiss the following:
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- 6 • Personal Injury Plaintiffs’ (“PI Plaintiffs”) claims against Mark Zuckerberg;
- 7 • PI Plaintiffs’ non-priority claims asserted in the Second Amended Master Complaint (ECF
 8 No. 494) (“Master Complaint”);
- 9 • Claims asserted in certain PI Plaintiffs’ short form complaints against Snap;
- 10 • Claims in the Multistate AGs’ Complaint and PI consumer protections claims and
 misrepresentation claims against Meta;
- 11 • Claims in the School District and Local Government Entities’ Master Complaint.

12 The Court will hear oral argument at the September 13, 2024 CMC on Meta’s motion to dismiss
 13 Florida’s Amended Complaint. ECF 1023; *see also* Case 4:23-cv-05885-YGR, ECFs 30, 32 and 33.
 14 Florida filed a Notice of Statement of Recent Decisions on August 23, 2024. *See* Case 4:23-cv-05885-
 15 YGR, ECF 35.

II. Recent Developments in Controlling Law

16 Since the April 23, 2024 hearing on several of the above pending motions to dismiss, the Parties
 17 have filed administrative motions for leave to file supplemental authority.¹ These administrative
 18 motions seek to bring to the Court’s attention various judicial decisions relevant to the pending motions.
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 24 ¹ See ECF Nos. 917 (*Alaska v. Express Scripts, Inc.*), 934 (*Social Media Cases*), 952 (*State ex rel. Griffin v. TikTok Inc.*), 990 (*Moody v. NetChoice, LLC*), 991 (*NetChoice, LLC v. Fitch*), 1036 (*Jane Doe v. WebGroup Czech Republic, A.S.*), 1045 (*NetChoice, LLC v. Reyes; State v. Meta Platforms, Inc.; Utah Div. of Consumer Protection v. Meta Platforms, Inc.; State v. Meta Platforms, Inc.*), 1065 (*Mayor & City Council of Balt. v. B.P. P.L.C.*), 1085 (*Calise v. Meta Platforms, Inc.; Jane Doe v. Uber Techs., Inc.*), 1088 (*Estate of Bride v. YOLO Techs., Inc.*), 1094 (*NetChoice, LLC v. Bonta*), 1105 (*Anderson v. TikTok, Inc.*).

1 **Defendants' Position:**

2 In recent weeks, the Ninth Circuit issued two decisions that are directly relevant to Plaintiffs' claims in this MDL: *NetChoice, LLC v. Bonta*, – F.4th –, 2024 WL 3838423 (9th Cir. Aug. 16, 2024), and *Estate of Bride v. Yolo Technologies, Inc.*, – F.4th –, 2024 WL 3894341 (9th Cir. Aug. 22, 2024). These rulings come on the heels of the Supreme Court's decision reaffirming that the First Amendment bars attempts, like Plaintiffs' here, to regulate expressive activities on Defendants' platforms. *Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2406 (2024) ("social media" companies' decisions about "which third-party content" to "display, or how the display will be ordered and organized" is expressive activity protected by the First Amendment). Given the timing and significance of these rulings, Defendants would like the opportunity to submit briefing or additional motions practice addressing their implications for Plaintiffs' claims. Defendants briefly discuss each decision below to support this request.

13 In *NetChoice v. Bonta*, the Ninth Circuit held that the First Amendment likely invalidates a provision of California law that requires online platforms to "opine on and mitigate the risk that" their "design"—including their "algorithms"—could expose children "to harmful or potentially harmful content, contact, or conduct online." 2024 WL 3838423, at *8, *10. The Ninth Circuit explained that the "forced creation and disclosure of [such] highly subjective opinions about content-related harms to children is unnecessary for fostering a proactive environment ... to protect children's safety online," and that such a warning requirement triggers (and fails) "strict First Amendment scrutiny." *Id.* at *14. The compelled speech found unconstitutional in *Bonta* was virtually identical to the "warnings" Plaintiffs seek to mandate here.

22 *Bride* was decided shortly after *Bonta*, and it makes clear that Section 230 separately applies to Plaintiffs' failure-to-warn claims. *Bride* held that Section 230 bars product liability claims—specifically including failure-to-warn claims—premised on the "general possibility of harm" to "teenagers" from the "design" of pervasive online features (in *Bride*, the defendant's anonymous messaging functionality, which allegedly facilitated the dissemination of harassing and bullying messages). 2024 WL 3894341, at *8. Like Plaintiffs' claims here, the failure to warn claims were centered "on YOLO's alleged failure to disclose these risks to users when they downloaded the YOLO app." *Id.* at *7. In holding that

1 Section 230 required dismissal of these claims, the court distinguished *Doe v. Internet Brands, Inc.*, 824
 2 F.3d 846 (9th Cir. 2016), and *Lemmon v. Snap, Inc.*, 995 F.3d 1085 (9th Cir. 2021), explaining that the
 3 *Bride* case was different because “the dangerous activity the alleged defective design incentivized was
 4 ... the sharing of messages between users.” *Bride*, 2024 WL 3894341, at *8. *Bride* cuts decisively
 5 against any suggestion that claims targeting features that would otherwise be barred by Section 230 can
 6 escape that immunity simply by being framed as failure-to-warn theories.

7 In short, *Bonta* and *Bride* are binding new decisions that cast serious doubt on the viability of
 8 certain of the claims this Court has allowed to proceed and other claims currently under consideration.
 9 Defendants respectfully submit that supplemental briefing or additional motion practice (whether under
 10 Fed. R. Civ. P. 12(b)(6), 12(c), or otherwise, including L.R. 7-9) is warranted to allow the parties to
 11 timely brief and this Court to consider the impact of these legal developments for this MDL. To that
 12 end, Defendants request guidance at the upcoming CMC regarding what briefing process or motion
 13 practice would be most useful to the Court. Plaintiffs’ arguments about these cases only underscore the
 14 value of allowing the parties to actually brief them. Plaintiffs cannot deny that *Bonta* and *Bride* are
 15 recent binding decisions that directly address claims and defenses at issue in these cases, and it is
 16 important for the parties and the Court to be able to address in a meaningful way their effect on
 17 Defendants’ pending motions to dismiss, the rulings the Court has already issued (particularly regarding
 18 Plaintiffs’ failure-to-warn claims), and the viability of Plaintiffs’ claims going forward.

19 **Plaintiffs’ Position:**

20 Plaintiffs oppose Defendants’ request for additional briefing or motion practice on the pending
 21 motions to dismiss. Additional briefing at this juncture is inefficient and unnecessary. Defendants’
 22 motions have been under submission for some time, and the Court has indicated it expects to rule on
 23 them this month, without having asked the Parties for additional briefing in response to any of the
 24 Parties’ administrative motions. Further, as explained below, the decisions Defendants seek to raise are
 25 of marginal relevance at best. Given this and Plaintiffs’ belief that unsolicited substantive legal briefing
 26 is not appropriate for CMC statements, Plaintiffs opposed inclusion of such briefing on these recent
 27 decisions here. At Defendants’ refusal to proceed without including such briefing (in favor of a request
 28 that the Court permit it separately), Plaintiffs respond in turn to Defendants’ extensive discussion below.

1 Plaintiffs further request that the Court direct that the Parties should not use CMC statements for
 2 unsolicited legal briefing in this manner.

3 Neither *Estate of Bride v. Yolo Technologies, Inc.* nor *NetChoice v. Bonta* warrants supplemental
 4 briefing as neither materially changes the state of the law applicable to Defendants' motions to dismiss.
 5 *Bride* is inapposite. *Bride* involved an anonymous messaging app (not at issue in this MDL) used by
 6 bullies to harass a child who then committed suicide. 2024 WL 389434, at *2. The "sole[]" basis for
 7 the estate's products liability claim was that app's anonymity feature. *Id.* at *3. The court concluded
 8 that online bullying "is a problem which besets the entire internet" and, given that, it could not "say that
 9 this [anonymity] feature was uniquely or unreasonable dangerous." *Id.* at *8-9.

10 While this MDL alleges numerous problematic aspects of Defendants' apps, allowing
 11 anonymous user accounts is not one of them. The PI/SD Plaintiffs' Second Amended Complaint refers
 12 to anonymous accounts only twice, and both times makes clear that the relevant defect is a lack of
 13 controls permitting parents to supervise their kids' creation of such accounts. Second Am. Compl. ¶¶
 14 352, 578. The Court has already concluded that Section 230 and the First Amendment do not prevent
 15 Plaintiffs from seeking to hold Defendants liable for ineffective and nonexistent parental controls. ECF
 16 430 at 51.

17 In addition, *Bride*, like many of the cases Defendants cited unsuccessfully during the previous
 18 briefing on the First Amendment and section 230, turned on third-party harm. The plaintiffs in *Bride*
 19 were unable to point to acts of misfeasance by the platform (rather than the platform's nonfeasance)
 20 permitting such claims to move forward. 2024 WL 389434, at *3. This case, by contrast, principally
 21 involves harm caused by choices Defendants themselves made. To the extent PI/SD Plaintiffs intend to
 22 raise claims premised on the bad actions of third parties, the Court has instructed them to amend their
 23 Complaint with the benefit of discovery to allege specific instances of misfeasance. ECF 430 at 47.
 24 Nothing about *Bride* should change this state of affairs.

25 Finally, to the extent *Bride* is relevant, it supports the claims that remain pending on Defendants'
 26 motion to dismiss. Specifically, *Bride* rejected Section 230 immunity for a misrepresentation claim
 27 premised on the app's promise "to its users that it would unmask and ban abusive users." *Bride*, 2024
 28 WL 3894341, at *6–7. Following its precedent in *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1099 (9th Cir.

1 2009), the Ninth Circuit held that, “[w]hile yes, online content is involved in these facts, and content
 2 moderation is one possible solution for YOLO to fulfill its promise, the underlying duty being invoked
 3 by the Plaintiffs … is the promise itself.” *Id.* at *7. That straightforward analysis should lead the Court
 4 to reject Defendants’ efforts to dismiss Counts 7-9 of the Complaint.

5 **PI/SD Plaintiffs’ Further Position:²**

6 *Bonta* is also inapposite to PI/SD Plaintiffs’ claims as it concerned a California statutory
 7 provision that is not at issue in this MDL. That statute required online businesses to create and submit to
 8 the state “reports” identifying “any risk of ‘material detriment to children that arise from the data
 9 management practices of the business[es],’” including whether the businesses “‘expos[ed] children to
 10 harmful, or potentially harmful, content[.]’” 2024 WL 3838423, at *8 (quoting Cal. Civ. Code
 11 § 1798.99.31(a)(1)). The Ninth Circuit held that this reporting requirement was a direct regulation on
 12 the businesses’ protected speech. *Id.* at *11-12. It pointed out that “the State could have developed a
 13 disclosure regime that defined data management practices and product designs without reference to
 14 whether children would be exposed to harmful or potentially harmful content or proxies for content,” but
 15 that the statute was not content neutral in this way. *Id.* at *14.

16 PI/SD Plaintiffs’ case in this MDL does not concern any legislative effort by a state government
 17 to regulate the content published online, and no such claim is at issue in Defendants’ pending motions to
 18 dismiss. To the extent *Bonta* has anything relevant to say, it cuts against Defendants’ arguments in this
 19 case. *Bonta* makes clear the Ninth Circuit does **not** view design as coextensive with content, expressly
 20 rejecting a facial challenge to a separate statutory prohibition on the use of design features like infinite
 21 scroll and autoplay. *Id.* at *14 & n.8.

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 26 ² Defendants did not raise a First Amendment argument outside the context of the *Noerr-Pennington*
 27 doctrine in the Motion to Dismiss the Multistate Attorneys General Complaint, Florida Attorney General
 28 Complaint, and Personal Injury Plaintiffs’ Consumer Protection and Misrepresentation Claims (ECF No.
 517), and Defendants did not seek to submit *Bonta* as supplemental authority with respect to that Motion
 (see ECF No. 1094).

1 Defendants claim that the government reports at issue in *Bonta* are just like the warnings
 2 Defendants failed to include with their products in this case. But that's completely wrong on the facts;
 3 the detailed government-mandated reports in *Bonta* bear no resemblance to products warnings, and of
 4 course *Bonta* was not a products liability case at all. Moreover, Defendants' reading of *Bonta* simply
 5 can't be right given other recent Ninth Circuit jurisprudence that Defendants conveniently ignore. In
 6 *Calise v. Meta Platforms*, the Ninth Circuit observed that Section 230 does **not** immunize a platform
 7 from liability for failure to warn, just because it may need to consider the content it hosts in order to
 8 issue a warning. 103 F.4th 732, 742 (9th Cir. 2024) (analyzing *Doe v. Internet Brands, Inc.*, 824 F.3d
 9 846 (9th Cir. 2016)). That approach lines up with recent appellate law from outside the circuit. *See*
 10 *Anderson v. TikTok, Inc.*, ___ F.4th ___, 2024 WL 3948248, at *2 n.10 (3d Cir. Aug. 27, 2024)
 11 (rejecting section 230 immunity for TikTok's algorithmic promotion of dangerous challenges).³

12 If the Court orders additional briefing, all Plaintiffs request the Parties be permitted to file
 13 simultaneous briefs of no more than ten pages per side addressing all of the decisions for which the
 14 Parties have sought leave to provide notice of supplemental authority.

15 III. Discovery Update

16 A copy of the Parties' Discovery Management Conference Statement for the September 12, 2024
 17 DMC, due this same date, will be sent by email to Judge Gonzalez Rogers after it is filed.

18 On September 6, 2024, Magistrate Judge Kang entered an order ruling on the State agency
 19 discovery dispute. *See* ECF 1117. While the Parties are still reviewing this order, the State AGs
 20 anticipate raising the format and length of any objection to this order at the CMC on September 13,
 21 2024.

22 IV. JCCP Status Update

23 On August 29, 2024, Judge Kuhl held a status conference. Judge Kuhl's rulings from the
 24 conference are memorialized in a Minute Order issued on August 30, 2024, which is attached as Exhibit
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 27 ³ See also David French, *The Viral Blackout Challenge Is Killing Young People. Courts Are Finally*
 28 *Taking It Seriously.*, NY Times (Sept. 5, 2024), <https://www.nytimes.com/2024/09/05/opinion/tiktok-blackout-challenge-anderson.html?smid=nytcore-ios-share&referringSource=articleShare&sgrp=c-cb>.

1 A. On August 30, Judge Kuhl also issued an order addressing CSAM discovered during the production
2 of Plaintiffs' device data, which is attached as Exhibit B.

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4 Respectfully submitted,

5 DATED: September 6, 2024

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ATTESTATION

I, Lexi J. Hazam, hereby attest, pursuant to N.D. Cal. Civil L.R. 5-1, that the concurrence to the filing of this document has been obtained from each signatory hereto.

Dated: September 6, 2024

By: /s/Lexi J. Hazam